

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of Applications of)	
)	
CONNEX FREIGHT)	FCC File No. D08472
)	
for Station WPKX960 to Operate)	
Frequency pair 810/855.0625 MHz)	
at Chatsworth (Los Angeles), California)	
)	

ORDER ON RECONSIDERATION

Adopted: July 28, 2000

Released: August 1, 2000

By the Chief, Public Safety and Private Wireless Division, Wireless Telecommunications Bureau:

I. Introduction

1. On October 22, 1997, James A. Kay, Jr. (Kay) filed a petition for reconsideration (Petition for Reconsideration) of the Licensing and Technical Analysis Branch (Branch), Public Safety and Private Wireless Division, Wireless Telecommunications Bureau's (Bureau) grant of the above-captioned application for Station WPKX960 (Connex Application). For the reasons discussed below, we grant the Petition for Reconsideration and rescind the authorization of Connex Freight to operate Station WPKX960.

II. Background

2. *Kay Modification Application.* On June 22, 1993, the FCC granted Kay authority to operate Station WJNA910 on various frequencies in the 800 MHz band, including frequency 855.0625 MHz, in Chatsworth, California. This authority was scheduled to expire on June 22, 1998. On April 26, 1994, Kay filed an application to modify the authorization for Station WJNA910 by adding additional frequencies as well as to surrender the authorization to operate on 855.0625 MHz.¹ The Bureau's former Licensing Division granted the modification application on October 31, 1995 and removed Kay's authorization to operate on 855.0625 MHz from the FCC's licensing database.² On November 27, 1995, the Licensing Division informed Kay that, as part of a pending hearing proceeding, it had set aside its grant of the modification application and returned it to pending status.³ Although the Licensing Division set aside the modification application, it did not restore the information in the FCC's licensing database to reflect the licensing information prior to the grant of Kay's modification application. As a result, the FCC's licensing database no longer indicated Kay's authorization to operate on 855.0625 MHz.

¹This application was assigned FCC File No. 663289 (Kay Modification Application).

²See *Public Notice*, Wireless Bureau Vacates and Supersedes Grants to SMRS Announced by March 17, 1995 Public Notice (Oct. 31, 1995).

³See Letter from Walter Boswell, Chief, Licensing Division, Wireless Telecommunications Bureau, FCC, to James A. Kay, dated November 27, 1995 (*November 27th Letter*). The hearing proceeding, *In the Matter of James A. Kay, Jr., Licensee of 152 Part 90 Stations in the Los Angeles, California Area*, (WT Docket 94-147) (Hearing Proceeding), examines Kay's fitness to be a Commission licensee and is currently pending on exceptions to the initial decision of Administrative Law Judge Joseph Chachkin.

3. On May 16, 1997, the Bureau's former Consumer Assistance Branch informed Kay that it was taking back the channels authorized in the modification application because Kay had failed to timely implement the authorized modifications.⁴ Kay responded on June 6, 1997, stating that he had not implemented the authorized modifications to Station WJNA910 because the Licensing Division had set aside the modification application and returned it to pending status.⁵ Kay further stated that because the Bureau, in the May 16th Letter, indicated that it had taken back the channel for reassignment, its records should reflect that the modification application remains on file and in pending status and requested that the Bureau correct its licensing data to reflect the parameters associated with Kay's authorized operations.⁶ Additionally, Kay argued that he was not under an obligation to complete construction within a year of October 31, 1995, because the Licensing Division had set aside the modification application on November 27, 1995, and Kay was therefore without authority to implement the proposed modifications.⁷

4. On May 21, 1995, Connex Freight (Connex) filed an application seeking to operate on frequency pair 810/855.0625 MHz at Chatsworth, California. On September 2, 1997, while the Connex Application remained pending, Kay requested dismissal of the Connex Application.⁸ Kay opined that the Connex Application was filed because the FCC's licensing database indicated that the channel was available, and argued that the database was inaccurate because Kay continued to hold a valid authorization for the frequency pair requested by Connex Freight.⁹ Kay stated that although the frequency pair would have become available as the result of the grant of its modification application, such grant was set aside by the November 27th Letter.¹⁰ Kay further stated that "[a]lthough the Bureau set aside the grant of the requested modification, the database was never updated to reflect that action."¹¹ Kay noted that he had repeatedly called this matter to the attention of the Commission staff, and reiterated his request for the Bureau to update its licensing records.¹² On September 22, 1997, the Branch granted the Connex Application and assigned Connex call sign WPKX960. On October 22, 1997, Kay filed the Petition for Reconsideration.

5. On November 27, 1998, Connex subsequently applied for authorization to modify Station WPKX960.¹³ On March 31, 1999, Kay filed a petition seeking dismissal or denial of this application

⁴Letter from Kathryn M. Garland, Chief, Consumer Assistance Branch, Customer Service Division, Wireless Telecommunications Bureau, FCC to Kay, dated May 16, 1997 (*May 16th Letter*).

⁵Letter from Robert J. Keller, Counsel for Kay, to Kathryn M. Garland, Chief, Consumer Assistance Branch, Customer Service Division, Wireless Telecommunications Bureau, dated May 16, 1997, and sent to the Bureau on June 6, 1997 (*June 6th Letter*).

⁶*Id.*

⁷*Id.*

⁸Letter from Robert J. Keller, Counsel for Kay, to Terry L. Fishel, Chief, Land Mobile Branch, Licensing Division, Wireless Telecommunications Bureau, FCC, dated September 2, 1997 (*September 2nd Letter*).

⁹*Id.*

¹⁰*Id.*

¹¹*Id.*

¹²*Id.*

¹³The Bureau assigned file number A022968 to this application.

(Petition to Deny-Connex).¹⁴ On April 29, 1999, the Branch granted Connex's application to modify Station WPKX960, effectively denying the Petition to Deny-Connex.

6. This proceeding presents us with three distinct issues requiring resolution. First, does Kay retain an effective and valid authorization for operation on 855.0625 MHz? Second, did Kay lose this authorization for failure to implement authorized modifications in a timely fashion? Third, was the Connex application granted in error? We note that because in their respective pleadings, the parties raise the same legal issues arising from the same nucleus of operative facts we will address the issues collectively, rather than addressing the issues raised by each pleading individually.

III. Discussion

7. *Status of Kay's Authorization to Operate on Frequency 855.0625 MHz.* Kay argues that the Branch could not assign 855.0625 MHz to another party because Kay retained an effective and valid authorization for that frequency.¹⁵ We agree. Section 1.113 of the Commission's Rules permits a delegated authority to set aside an action on its own motion.¹⁶ License grants are made subject to the provision that they may be set aside within thirty days. The Commission has previously held that the set aside of a license grant within this period was not a final grant. Thus, the set aside of the grant of the modification application resulted in the return of the application to pending status.¹⁷ This action was taken without prejudice to further action that would be taken with respect to the modification application.¹⁸ Even though Kay requested to surrender 855.0625 MHz as part of his proposed modification to Station WJNA910, when the Licensing Division set aside the grant of the modification application, the authorization of Station WJNA910 reverted to its pre-modification application status. For the same reasons, we also agree that the Consumer Assistance Branch erred when it found that Kay had failed to timely implement the modifications to Station WJNA910 that were proposed in the modification application.

8. *Connex Applications.* We find that, because, as we discussed *supra*, Kay retained an effective and valid authorization for 855.0625 MHz at Oat Mountain, the Licensing Division erred in granting Connex's authorization to operate on that frequency at that location.¹⁹ Similarly, we find that the Licensing Division erred in granting Connex's modification of its initial authorization to operate on that frequency at the Oat Mountain location.

¹⁴On April 13, 1999, Connex filed an Opposition to the Petition to Dismiss or Deny (Connex Opposition), and on April 26, 1999, Kay filed a Reply to the Connex Opposition (Kay Reply-Connex). On April 26, 1999, Kay filed a motion to disqualify Connex's counsel from further participation in these matters. In light of the fact that the counsel in question voluntarily withdrew on May 3, 1999, we will not address the motion to disqualify counsel in this order.

¹⁵Petition for Reconsideration at 1 and Petition to Deny-Connex at 1.

¹⁶47 C.F.R. § 1.113; *see also* Washoe County Physicians Answering Service, *Letter*, 35 Rad. Reg. 2d (P & F) 1028 (1975); COMNAV Marine, *Memorandum Opinion and Order*, 2 FCC Rcd 2144 (PRB 1987).

¹⁷*See* Teleglobe USA, Inc., *Order, Authorization and Certificate*, 11 FCC Rcd 8162 n.4 (IB 1996).

¹⁸*See* Jacor Broadcasting of Colorado, Inc., *Memorandum Opinion and Order*, 9 FCC Rcd 4472 (MMB 1994).

¹⁹*See* 47 C.F.R. § 1.934(e)(2), which provides that the Commission may dismiss applications that request spectrum which is unavailable because it was previously assigned to another licensee on an exclusive basis or cannot be assigned to the applicant without causing harmful interference.

9. We disagree with Connex's argument that the Petition for Reconsideration, challenging the grant of Connex's initial authorization, is deemed denied because we did not act on the petition within ninety days of its filing on October 22, 1997.²⁰ As Kay correctly points out, there is ample Commission and judicial precedent recognizing that the Commission's failure to act within ninety days of the filing of a petition for reconsideration does not constitute a denial of the petition.²¹

10. Further, we disagree with Connex's argument that these matters are governed by the Commission's statement in *Frequency Coordination in the Private Land Mobile Radio Services* that "in the case of inconsistencies or discrepancies, the Commission's database will govern and be used to resolve any disputes."²² The Commission intended this "data base rule" to apply to cases involving inconsistencies and discrepancies between the Commission's databases and those of third parties, not to cases involving errors in the Commission's database itself.²³

11. We are similarly unpersuaded by Connex's contention that the Bureau properly granted the Connex Application because the database showed that 855.0625 MHz was available for assignment. While we generally do not make frequencies available for further assignment until we purge them from the database and do not accept applications for a particular frequency until that frequency has been deleted from the database, as we noted above, the Branch erred when it listed 855.0625 MHz as available for assignment.

12. We also disagree with Connex's argument that in order to challenge Connex's application to modify Station WPKX960, Kay must show that he had suffered harmful interference from Connex's operation of that station.²⁴ In light of Kay's assertion that the Licensing Division erred in granting Connex's initial authorization to operate Station WPKX960 on 855.0625 MHz because he retained a valid authorization to operate on that frequency, a showing of harmful interference is not required because Kay had exclusive use of this frequency.²⁵ Consequently, we find that this frequency was not available for assignment to Connex.²⁶

²⁰Connex Opposition at 2 *citing* 47 U.S.C. § 405(a).

²¹Kay Reply-Connex at 2 *citing* Rebecca Radio of Marco, 5 FCC Rcd 2913 at n.8 (May 1990) (Commission order is valid despite the Commission's more than 30 day delay in granting reconsideration), and *Citizens Committee v. FCC*, 436 F.2d 263 at n.5 (D.C. Cir. 1970) (The fact that a Commission order was not issued within 90 days of the filing of the petition for reconsideration does not render the order invalid).

²²Connex Opposition at 3, *citing* *Frequency Coordination in the Private Land Mobile Radio Services*, 103 FCC 2d 1093 (1986), 60 Rad. Reg. 2d (P&F) 41, ¶ 41.

²³*See Replacement of Part 90 by Part 88 to Revise the Private Land Mobile Radio Services and Modify the Policies Governing Them*, 12 FCC Rcd 14307, ¶ 46 (1997) ("Any disputes that arise due to inconsistencies or discrepancies in the records of **different coordinators**, however, will be resolved using the Commission's database.")(emphasis added).

²⁴Connex Opposition at 2.

²⁵Kay's license lists 300 portable units and 900 vehicle units operating on 855.625 MHz from the Oat Mountain site. 47 C.F.R. § 90.625 provides that where an applicant shows an 800 MHz private land mobile radio channel will be loaded with 70 mobile stations, that channel will be made available to the applicant for its exclusive use in the area he proposes to operate. *See* 47 C.F.R. § 90.625(a).

²⁶*See* 47 C.F.R. § 1.934(e)(2), which provides that the Commission may dismiss applications that request spectrum which is unavailable because it was previously assigned to another licensee on an exclusive basis or cannot be assigned to the applicant without causing harmful interference. This provision clarifies former 47 C.F.R. §

IV. Conclusion and Ordering Clauses

13. In light of the foregoing considerations, we grant the Petition for Reconsideration and terminate the license grant of Connex. Therefore, pursuant to Sections 4(i) and 405 of the Communications Act, as amended, 47 U.S.C. §§ 154, 405, and by Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, IT IS ORDERED that the Petition for Reconsideration filed on October 22, 1997, by James A. Kay, Jr., IS GRANTED.

14. IT IS FURTHER ORDERED, pursuant to Section 4(i) of the Communications Act, as amended, 47 U.S.C. § 154(i) and Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, the grant of the license for call sign WPKX960 to Connex Freight IS RESCINDED.

15. This action is taken under delegated authority pursuant to Sections 0.131 and 0.331 of the Commission's Rules, 47 C.F.R. §§ 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

D'wana R. Terry
Chief, Public Safety and Private Wireless Division
Wireless Telecommunications Bureau

1.958(a)(6) (1998) which categorized these applications as not in accordance with the Commission's rules or requirements and subject to dismissal. *See* former 47 C.F.R. § 1.958(a)(6).